89-109

No. _____

In The

Supreme Court of the United States

October Term, 1989

MEAD EMBALLAGE, S.A.,

Petitioner,

v.

SEAN BERNSTEIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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QUESTIONS PRESENTED

A French component part manufacturer placed its product into the stream of commerce by selling its product, in France, to another French company which incorporated the component into its own product which it distributes worldwide. The French component part manufacturer had neither any contact with the state of Florida, nor an ability to direct where its product was ultimately sold to the consuming public. The questions presented are:

1. Is the mere awareness of the French component part manufacturer that a substantial number of the other French company's finished products are sold in Florida adequate to establish the requisite contacts authorizing a Florida court to exercise personal jurisdiction over it?

2. Have advancements in modern substantive products liability law obviated the need to expand traditional concepts of minimum contacts in order to increase an injured plaintiff's ability to seek restitution for damages caused by a foreign manufacturer?

PARTIES TO THE PROCEEDING

The parties are those named in the caption. In compliance with Supreme Court Rule 28.1, petitioner states that it is a subsidiary of The Mead Corporation. The Mead Corporation owns 99.53% of the stock of petitioner. The following is a list of all other non-wholly owned subsidiaries and affiliates of The Mead Corporation:

B.C. Chemicals, Ltd.

Northwood Forest Industries, Ltd.

Northwood Pulp & Timber, Ltd.

Harima M.I.D., Inc.

Mead Europe Engineering, SARL

Mead-Pac, AB

International Fibre Sales, S.A.

Mead-Toppan Company, Ltd.

Seiko Mead Corporation

Seiko Mead Company

Sistemas de Envase y Embalaje, S.A.

D.I. Associates, Inc.

MHB Joint Venture

Cabin Bluff Partners

Newmark Associates

Newmark Associates K

Mead Packaging Europe, SARL

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The petitioner Mead Emballage, S.A. (hereinafter "Mead") respectfully prays that a writ of certiorari issue to review the opinion of the District Court of Appeal of Florida, Third District, entered in the above-entitled proceeding on April 25, 1989.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, which appears in the appendix hereto, at App. 3, *infra*, is reported at 541 So. 2d 794 (Fla. Dist. Ct. App. 1989).

The order of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, which the District Court of Appeal affirmed, is unreported. It is reprinted in the appendix hereto, at App. 5, *infra*.

JURISDICTION

The decision of the District Court of Appeal of Florida, Third District, hereinafter referred to as the DCA, affirming the order of the trial court and rejecting petitioner's constitutional challenge to Florida's exercise of jurisdiction over Mead, was entered April 25, 1989.

But for limited circumstances not applicable here, the Supreme Court of Florida may only exercise its jurisdiction over decisions which expressly conflict with other decisions, expressly declare valid a state statute or expressly construe a provision of the state or federal constitution. Fla. Const. art. V, § 3(b)(3)-(5).

The DCA's decision which simply cites cases without a written opinion did not satisfy the "expressly" requirement and precluded petitioner from seeking the jurisdiction of the Supreme Court of Florida. *See Dodi Publishing Co. v. Editorial Am., S.A.*, 385 So. 2d 1369 (Fla. 1980).[1] The DCA therefore became the highest court from which a decision could be obtained. *Williams v. Florida*, 399 U.S. 78, 80 n.5 (1970).

The time within which to apply for certiorari thus runs from April 25, 1989 and expires on July 24, 1989.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant Florida Statute is § 48.193(1)(f)2, Fla. Stat. (1987):

> (1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:
>
> (f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside the state, if, at or about the time of the injury, either:

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[1] This Court has granted certiorari to a district court of appeal of Florida which affirmed an order of a trial court without opinion thereby denying the Supreme Court of Florida jurisdiction to review the case. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

> 2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade or use.

The provision of the United States Constitution involved is the Due Process Clause of the Fourteenth Amendment:

> Section 1. . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Sean Bernstein, a Florida resident, was injured while performing duties as an employee at a food market in North Miami Beach, Florida. As a consequence, he filed a products liability action. Specifically, he alleged that as part of his duties, he was asked to carry a six-pack of Perrier water from the store shelf to the check-out counter. He alleged that while carrying the six-pack, one bottle of water fell from the cardboard carton, struck the floor, and thereby caused him bodily injury.

Bernstein named as defendants Great Waters of France, Inc., alleged to be the distributor of Perrier products in North Miami Beach, Florida, and Mead,[2] alleged

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[2] Bernstein originally named The Mead Corporation as defendant. When it was discovered that The Mead Corporation was not a proper party, Mead Emballage, S.A. was substituted as a named defendant. Although this procedure may have affected Mead's ability to contest any defects in service of

(Continued on following page)

to be the manufacturer of the cardboard carton holding six Perrier bottles thereby forming a six-pack (known as a "2X3 Perrier cluster-pak").

Mead filed its answer and, pursuant to Florida Rule of Civil Procedure 1.140(b), asserted its defense that "the Court lacks personal jurisdiction over it." Subsequently, Mead filed its motion to dismiss based solely on the trial court's lack of personal jurisdiction over Mead.

In support of that motion, Mead attached the affidavit of Olindo Iacobelli, Mead's Vice President and General Manager, and the answers to interrogatories propounded to co-defendant Great Waters of France, Inc. The affidavit established that Mead is a French corporation with absolutely no presence in Florida. Mead conducts no business in Florida, maintains no offices in Florida, has no employees in Florida, solicits no business in Florida, has no interest in any property in Florida, and is not licensed or authorized to do business in Florida. One hundred percent of the cluster-pak cartons produced by Mead are manufactured in France, and sold and delivered by Mead in France to another French corporation, Perrier. Mead has never contemplated that its sales of cluster-pak cartons to Perrier in France would subject it to lawsuits in Florida.

(Continued from previous page)

process, i.e. form of summons or lack of delivery, it in no manner affected Mead's ability to challenge the court's jurisdiction over its person. *See Harris Corp. v. Nat'l Iranian Radio and Television*, 691 F.2d 1344, 1353 n. 18 (11th Cir. 1982).

During the three years prior to Bernstein's accident, only 7.74% of the cluster-pak cartons manufactured by Mead for the United States market were distributed by Great Waters of France, Inc. to Florida. A simple mathematical calculation revealed that Mead derived a mere .4% of its total income during those three years from the sale to Perrier of the number of cluster-pak cartons ultimately delivered into Florida.

Bernstein filed no controverting evidence prior to the trial court ruling on Mead's motion to dismiss. After hearing argument from counsel, the trial court entered its order denying Mead's motion. Mead appealed that order to the District Court of Appeal of Florida, Third District pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(c)(i). The only issue raised in the district court was that:

> Florida Statute Section 48.193(1)(f)(2) (1987) is invalid as applied to the facts of this case as the statute is repugnant to the Fourteenth Amendment of the United States Constitution.

The district court affirmed the denial of Mead's motion. In so doing the court chose not to write an opinion. The court did, however, cite *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987), among other decisions in support of its decision. Thereupon Mead initiated these certiorari proceedings.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This petition presents the issue of whether the Due Process Clause forbids a state court from exercising per-

sonal jurisdiction over a foreign component part manufacturer[3] that merely places its products into the stream of commerce even though it may foresee that those products will ultimately find their way into the forum state. This issue is virtually identical to the first of two questions presented in *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987) upon which this Court granted certiorari to the Supreme Court of the State of California. *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 475 U.S. 1044 (1986). This Court, however, was unable to issue a definitive opinion on the constitutional propriety of the stream of commerce theory. The deep split among the many jurisdictions, both state and federal, which have addressed the issue at bar evinces the need of both courts and the public as a whole for definitive guidance.

I

The District Court Of Appeal Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court

The stream of commerce theory of personal jurisdiction has been the subject of much comment since its genesis in *Gray v. Am. Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961). However, it is this Court's brushes with the issue that over the past decade

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[3] In Florida the cardboard carton of a beverage six-pack (referred to by the courts as a "secondary container"), is a component part of the six-pack for purposes of products liability considerations. *Schuessler v. Coca-Cola Bottling Co.*, 279 So. 2d 901 (Fla. 4th Dist. Ct. App. 1973); *Gay v. Kelly*, 200 So. 2d 568 (Fla. 1st Dist. Ct. App. 1967).

have fueled a blaze of controversy and confusion which has raged through the jurisdictions. The first spark appeared in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), where in dicta this Court stated:

> The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. at 297-298.

Courts throughout the country, including the Supreme Court of Florida, seized that statement as an opportunity to expand their jurisdiction beyond the bounds that they themselves had previously deemed acceptable. *See Ford Motor Co. v. Atwood Vacuum Mach. Co.*, 392 So. 2d 1305, 1311 (Fla. 1981). Although the issue smoldered after *World-Wide*, it was this Court's subsequent decision in *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987) which set the controversy ablaze. The stream of commerce theory was put at issue in *Asahi*. Justice O'Conner, joined by Chief Justice Rehnquist, Justice Powell and Justice Scalia, authored the plurality opinion of the Court and opined that the mere placement of a product into the stream of commerce is not an act sufficient for a state to exercise jurisdiction. Justice Brennan, on the other hand, joined by Justice White, Justice Marshall and Justice Blackmun, opined that as long as a manufacturer is aware that its product may be sold in the forum state, that state can exercise

jurisdiction.[4] Justice Stevens found it unnecessary todecide the stream of commerce issue to decide the case.

Obviously the divided opinion of this Court created no binding authority as to the stream of commerce issue. The post-*Asahi* decisions reflect that the case not only failed to provide guideposts for lower courts, but created mass confusion.[5] Although many courts have rejected the stream of commerce theory as a basis for jurisdiction,[6] others have maintained or adopted it.[7] Even judges on the same court have issued conflicting opinions regarding the issue. *Compare Andrews Univ. v. Robert Bell Indus., Ltd.*, 685 F.Supp. 1015 (W.D. Mich. 1988) (rejects stream of commerce theory) *with Ag-Chem Equip. Co., Inc. v. AVCO Corp.*, 666 F.Supp. 1010 (W.D. Mich. 1987) (accepts stream

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[4] It is this view as expressed by Justice Brennan which is referred to as "the stream of commerce theory" throughout this petition.

[5] One prominent commentator has stated that *Asahi* "has the potential for further complicating the due process test for personal jurisdiction and inviting an even greater amount of litigation on that issue." Weintraub, *Asahi Sends Personal Jurisdiction Down The Tubes*, 23 Tex.Int'l L.J. 55, 55 (1988).

[6] *Tomashevsky v. Komori Printing Mach. Co., Ltd.*, 691 F.Supp. 336 (S.D. Fla. 1988); *Sturgill v. Chema Nord Delekkemi Nobel Indus.*, 687 F.Supp. 351 (S.D. Ohio 1988); *Rossetti v. Esselte-Pendeflex Corp.*, 683 F.Supp. 532 (D. Md. 1988); *Smith v. Dainichi Kinzoku Kogyo Co., Ltd.*, 680 F.Supp. 847 (W.D. Tex. 1988); *Felix v. Bomoro Kommanditgesellschaft*, 196 Cal.App.3d 106, 241 Cal.Rptr. 670 (1987).

[7] *Wessinger v. Vetter Corp.*, 685 F.Supp. 769 (D. Kan. 1987); *Hall v. Zambelli*, 669 F.Supp. 753 (S.D. W.Va. 1987); *Ford v. Johns-Manville Sales Corp.*, 662 F.Supp. 930 (S.D. Ind. 1987).

of commerce theory).[8] The Supreme Court of Illinois, the court to decide the seminal case of *Gray*, referred to *Asahi* as an "extremely Balkanized opinion," and expressed its uncertainty about the status of the theory it developed 28 years ago:

> As can be seen from this exposition, it is not possible to determine from *Asahi* whether the broad or the narrow version of the stream of commerce theory is correct.

Wiles v. Morita Iron Works Co., Ltd., 125 Ill.2d 144, 530 N.E.2d 1382, 1389 (1988).[9]

The DCA's decision in the instant case is a prime illustration of the confusion caused by *Asahi*. Although the court chose not to write an opinion, it did cite *Asahi* in support of its decision that the courts of Florida could assert jurisdiction over Mead. Yet, *Asahi* cannot possibly be cited for that proposition. The case created no binding authority regarding the stream of commerce theory. Additionally, all nine Justices ultimately determined that the forum state could *not* exercise jurisdiction over the defendant.

The uncertainty created by *Asahi* necessitates that the stream of commerce issue be finally determined. It is, of

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[8] For reasons not disclosed, the *Ag-Chem* decision was later vacated by the same court. *Ag-Chem Equip. Co., Inc. v. AVCO Corp.*, 701 F.Supp. 603 (W.D. Mich. 1988).

[9] Even before *Asahi* there was much controversy among the courts regarding the propriety of the stream of commerce theory. *See* Annotation, *Products Liability: In Personam Jurisdiction Over Nonresident Manufacturer Or Seller Under "Long- Arm" Statutes*, 19 A.L.R.3d 13 (1968).

course, of great importance for the manufacturers of component parts to know when and where they might be subject to jurisdiction. Courts and potential litigants are in need of an authoritative decision so that they might fashion their conduct accordingly. In the instant case there was but one issue presented and one issue decided: whether a state court may exercise jurisdiction over a foreign component part manufacturer that merely places its product into the stream of commerce but may reasonably foresee that its product will be sold in the forum state. The instant case provides an untangled factual scenario upon which an authoritative rule of law can be developed.

II

The District Court Of Appeal Has Decided A Federal Question In A Way In Conflict With Applicable Decisions Of This Court And Federal Courts of Appeal

Although the restrictive concept of territorial jurisdiction as announced in *Pennoyner v. Neff*, 95 U.S. 714 (1877), has long been abandoned, the Fourteenth Amendment of the United States Constitution limits the power of a state court to exert personal jurisdiction over a nonresident defendant. The Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 319 (1945). Whether sufficient contacts exist depends on whether "a corporation purposefully avails itself of the privilege of conduct-

ing activities within the forum state." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The "purposeful availment" requirement is only satisfied when a nonresident "purposefully directs its activities toward forum residents." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). This Court has never wavered from the rule that unilateral activity of those who have some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. *World-Wide*, 444 U.S. at 298; *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957). Even when it is foreseeable to a defendant that a third party will direct a product into the forum state and the defendant indirectly earns substantial revenue from the presence of its product in the forum state, this Court has held that those facts alone do not authorize the forum state to exercise jurisdiction. *World-Wide*, 444 U.S. at 295, 299.

In the instant case, Mead has no contact with Florida. Its sole relationship with the state is that it is aware that a third party directs its products into Florida and Mead thereby indirectly earns revenue. In light of those facts, no holding of this Court can be cited to support Florida's exercise of jurisdiction over Mead. The DCA's decision is in conflict with this Court's long line of decisions holding that the unilateral actions of a third party cannot satisfy the requirement of contact with the forum state.

The instant case also is in irreconcilable conflict with decisions of three federal courts of appeals which have refused to extend the stream of commerce theory of jurisdiction to situations where the product manufacturer has

not engaged in any voluntary conduct with respect to the forum.

Directly in conflict with *Mead* is *Humble v. Toyota Motor Co., Ltd.*, 578 F.Supp. 530 (N.D. Iowa 1982), *aff'd*, 727 F.2d 709 (8th Cir. 1984). There, the plaintiff sued the manufacturer of an automobile, Toyota, and the manufacturer of the automobile seats, Arakawa, for injuries sustained in an automobile accident in Iowa. The plaintiff alleged that the seats were defective. Arakawa, a Japanese corporation with no contacts in Iowa, manufactured and sold its seats in Japan to Toyota. Upon holding that Arakawa did not have sufficient minimum contacts with Iowa, the court noted that the only relationship Arakawa had with Iowa was that Toyota incorporated Arakawa's product into its own product which it sold in Iowa. The court found that even though it was foreseeable to Arakawa that its product would find its way into Iowa, Arakawa had not purposely availed itself of the privilege of conducting business in Iowa. The court concluded that no jurisdiction could be obtained over a foreign defendant who placed a product in the stream of commerce where the foreign defendant did not consciously solicit or market the product in the forum state and thus had not purposefully availed itself of the privilege of conducting business there.

Similarly in conflict with *Mead* is *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981). There, the defendant Hitachi was a Japanese corporation which had converted a vessel in Japan from a bulk carrier to an automobile carrier. Hitachi was sued in New Jersey for injuries allegedly caused by the vessel. Hitachi had not sought to market its

product in the forum state, and had no contacts, ties or relations with the forum state. The court rejected the concept that the stream of commerce theory could provide a constitutional basis for imposing jurisdiction over the foreign manufacturer where it did not voluntarily act with respect to the forum.

Also in conflict with *Mead* is *Banton Indus., Inc. v. Dimatic Die & Tool Co.*, 801 F.2d 1283 (11th Cir. 1986). There, the defendant was a Nebraska corporation which manufactured pulleys. The plaintiff, an Alabama corporation, placed an unsolicited order for 2400 pulleys, f.o.b. Omaha, Nebraska, and installed those pulleys in motorized garden tillers that it sold to its customers. The plaintiff sued the defendant in Alabama alleging that the pulleys were defective. In affirming the dismissal of the complaint for lack of personal jurisdiction the court noted that the defendant had no contact with the state of Alabama other than selling its product, in Nebraska, to an Alabama resident. The court held this insufficient to satisfy the due process requirement of minimum contacts. In rendering its decision, the circuit court specifically rejected the dissenting opinion that the stream of commerce theory be applied to find that Alabama could exercise jurisdiction. *Id.* at 1285-1286.

Mead presents this Court with the opportunity to resolve the conflicts which exist between the jurisdictions and to establish a uniform basis upon which all courts can determine whether a state has authority to exercise jurisdiction.

Mead, and all cases in which the stream of commerce theory has been adopted, is also in conflict with the long-

standing decisions of this Court holding that the "purposeful availment" requirement of the due process clause is to protect *defendants* from being haled into the forum state solely as a result of attenuated contacts. *Burger King*, 471 U.S. at 475. That requirement safeguards a defendant from the burdens of litigating in a distant or inconvenient forum. *World-Wide*, 444 U.S. at 292. The stream of commerce theory of jurisdiction, however, disregards this traditional principle and shifts the burden of litigation from the plaintiff to the defendant and manufacturing industry which placed the product in the market. *Shaffer v. Heitner*, 433 U.S. 186, 223 (1977) (Brennan J., dissenting); *Gray*, 176 N.E. 2d at 766. Even the most prominent promoters of the stream of commerce theory have recognized that the conduct of a defendant which satisfies the jurisdictional requirements of that theory, may not be sufficient to satisfy traditional requirements of "minimum contacts." *Shaffer*, 433 U.S. at 223 (Brennan J., dissenting). Those proponents argue, however, that courts should venture outside the prevailing due process framework in order to minimize the burdens of seeking restitution. *Id.*

The stated purpose of the stream of commerce theory is a noble and legitimate concern. Indeed all states have an interest in reducing the hardships inherently placed on its residents when seeking restitution from a foreign manufacturer. That goal, however, can be and has been accomplished without distorting traditional concepts of due process as is otherwise required by the stream of commerce theory. The interest of the states to increase the ability of its residents to seek restitution for injuries caused by foreign manufacturers has been satisfied by

recent advancements in the development of substantive products liability law. The DCA here, and all courts to adopt the stream of commerce theory, have ignored the fact that all fifty states, Puerto Rico and the District of Columbia have adopted the doctrine of strict liability or its equivalent.[10] The adoption of strict liability has obviated the need for a plaintiff to sue a foreign manufacturer in order to recover damages caused by that manufacturer.

In a cause of action for strict liability, any of the numerous commercial entities along the distributive chain of a product can be held liable for damages caused by a product or a component of a product. This liability attaches regardless of fault. Thus, strict liability actually increases the number of potential defendants from one manufacturer, to any number of numerous commercial entities along the distributive chain, many of whom necessarily are subject to jurisdiction in the forum state.

In addition, strict liability decreases the burden of proof by eliminating the necessity of proving "fault." After the plaintiff has been fully recompensed, it is for the commercial entities to litigate among themselves via indemnity actions to determine and apportion fault. *See* L. FUMER & M. FREIDMAN, PRODUCTS LIABILITY, § 15.03(1)

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[10] *See* AMERICAN LAW OF PRODUCTS LIABILITY 3d ¶¶16:9, 16:13, 16:15-17 (J. Perovich ed. 1989). Although Delaware, Massachusetts, Michigan, North Carolina and Virginia have yet to adopt strict liability, those states have enacted laws imposing implied warranties which are virtually identical to the strict liability requirements of RESTATEMENT (SECOND) OF TORTS § 402A. *Id.* at ¶16:18. The doctrine of strict liability is well established in Florida's jurisprudence. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

(1988), *citing, Texaco, Inc. v. McGrew Lumber Co.*, 117 Ill.2d 351, 254 N.E. 2d 584, 588 (1969) ("the policy considerations announced . . . in imposing strict liability justify the relief of indemnity against persons in the distributive chain who have placed a product in the stream of commerce with the knowledge of its intended use.")[11] The costs to vicariously liable (passively negligent) defendants, associated with litigating subsequent indemnity actions, or the inability to recover from insolvent actively negligent manufacturers, is simply absorbed as a cost of doing business and disbursed by adjusting the price of the product.[12]

One of the cardinal rules governing the judiciary is that when a needed change in the law can be accomplished on other than constitutional grounds, constitutional interpretation should be avoided. *See Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979). When it does become necessary to interpret the constitution, a court should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985), *quoting, United States v. Raines*, 362 U.S. 17, 21 (1960). Thus even though a change in the law can be accomplished by the expansion of a constitutional doctrine, that expansion should be avoided if the same goal can be, or has been, achieved through other means. *United States v. Mandujano*, 425 U.S. 564, 580 (1976)

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[11] *Asahi* is a classic example of how the indemnification process operates.

[12] These costs can of course be greatly reduced by obtaining appropriate insurance coverage.

("[T]he dynamics of constitutional interpretation do not compel constant extension of every doctrine announced by the Court.")

It is quite clear that courts adopting the stream of commerce theory have given no consideration to the recent changes to substantive products liability law. They have relied on law which was developed prior to the adoption of strict liability. It is very telling indeed that the seminal case of the stream of commerce theory, *Gray v. Am. Radiator & Standard Sanitary Corp.*, an Illinois decision, was decided four years prior to the adoption of strict liability in Illinois. *See Suvada v. White Motor Co.*, 32 I11.2d 612, 210 N.E. 2d 182 (1965).

As recognized by the commentators of the RESTATEMENT (SECOND) OF TORTS, and every jurisdiction to adopt strict liability, the very purpose of imposing strict liability is to shift the burdens of obtaining compensation for damages caused by a defective product from the innocent users of those products to the commercial entities that have profited from those products:

> [T]he justification for the strict liability has been said to be . . . that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained . . .

RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965).

Those courts adopting the stream of commerce theory seek to accomplish, by stretching the bounds of the Fourteenth Amendment, precisely the same goals accomplished through the adoption of strict liability. Strict liability has provided plaintiffs injured by foreign

manufacturers with greater access to restitution. Equally important, that legitimate goal has been achieved while simultaneously preserving traditional constitutional norms. A court need not stretch the elastic arms of blind justice halfway around the world to grab and haul into the forum state a foreign defendant who has absolutely no contact with that state.

Because of Perrier's efforts to distribute its product worldwide, the foreseeability that the component manufactured by Mead may be consumed anywhere cannot be denied. As discussed earlier, however, foreseeability alone is not sufficient to confer jurisdiction. A defendant's amenability to suit does not, necessarily, travel with the chattel. *World-Wide*, 444 U.S. at 296. Yet, by applying the stream of commerce theory to confer jurisdiction over the manufacturer of a component part which is unilaterally distributed by a third party worldwide, the DCA effectively appointed Mead's product as its agent for the purpose of establishing jurisdiction.

Today it is commonplace that the lineage of a product include several manufacturers, states and nations. The global assembly line is a thing of the present. It is of great importance for the manufacturers of the components of those products to know where and under what circumstances they will be subject to jurisdiction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Court should grant a writ of certiorari to review the decision of the District Court of Appeal, Third District of Florida.

Respectfully submitted,

DOUGLAS H. STEIN
BLACKWELL, WALKER, FASCELL & HOEHL
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Miami, Florida 33131
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Counsel of Record for Petitioner

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(SEAL)

DISTRICT COURT OF APPEAL
THIRD DISTRICT
2001 S. W. 117 AVENUE
P. O. BOX 650307
MIAMI, FLORIDA 33265-0307

TELEPHONE (305) 221-1200
FAX (305) 221-0543

May 11, 1989

RE: MEAD EMBALLAGE, S.A. vs.
SEAN BERNSTEIN
CIRCUIT # 88-25911
DCA # 89-598

This is to advise you that the mandate in the above styled cause has been issued this date and mailed to Richard P. Brinker, Clerk of the Circuit Court of Dade County, Florida.

Very truly yours,

/s/ Louis J. Spallone
Clerk District Court of
Appeal, Third District

LJS/MS

cc: Douglas H. Stein; Arnold D. Hessen; Joel V. Lumer

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1989

MEAD EMBALLAGE, S.A., **
Appellant, **
vs. ** CASE NO. 89-598
SEAN BERNSTEIN, **
Appellee. **

Opinion filed April 25, 1989.

An Appeal from a non-final order of the Circuit Court for Dade County, Edward N. Moore, Judge.

Blackwell, Walker, Fascell & Hoehl and Douglas H. Stein, for Appellant.

Hessen, Schimmel & DeCastro and Arnold D. Hessen; Joel V. Lumer, for Appellee.

Before HUBBART, NESBITT and FERGUSON, JJ.

PFR CURIAM.

Affirmed. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); *Ford Motor Co. v. Atwood Vacuum Mach. Co.*, 392 So.2d 1305 (Fla.), *cert. denied*, 452 U.S. 901,

101 S.Ct. 3024, 69 L.Ed.2d 401 (1981); *Life Labs., Inc. v. Valdes,* 387 So.2d 1009 (Fla. 3d DCA 1980).

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 88-25911 CA 16

SEAN BERSTEIN (sic),
Plaintiff,

v.

GREAT WATERS OF FRANCE, INC., et al.,
Defendants.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS CAUSE having come before the Court upon Defendant Mead Emballage, S.A.'s Motion to Dismiss on March 15, 1989, and the Court having heard argument of counsel and being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED that Mead Emballage, S.A.'s Motion to Dismiss is hereby denied.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 15th day of March, 1989.

/s/ EDWARD N. MOORE
CIRCUIT COURT JUDGE

copies furnished to:
Douglas H. Stein, Esq.
Arnold D. Hessen, Esq.
David R. Howland, Esq.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 88-25911 CA 16
FLA. BAR NO. 355283

SEAN BERNSTEIN,
Plaintiff,
v.
GREAT WATERS OF FRANCE, INC., et al.,
Defendants.

MEAD EMBALLAGE, S.A.'S MOTION TO DISMISS

The defendant, Mead Emballage, S.A. ("Mead") moves this Court to dismiss plaintiff's complaint for lack of personal jurisdiction and as grounds therefore relies on the following memorandum at law.

MEMORANDUM OF LAW IN SUPPORT OF MEAD'S MOTION TO DISMISS

FLORIDA STATUTE SECTION 48.193(1)(f)(2)(1987) IS INVALID AS APPLIED TO THE FACTS OF THIS CASE AS THE STATUTE IS REPUGNANT TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

I. *FACTUAL ALLEGATIONS*

In his complaint, plaintiff alleges that he was injured while performing duties as an employee at a food market in North Miami Beach, Florida. Specifically, plaintiff alleges that as part of his duties, he was asked to carry a six-pack of Perrier water (known as a "2X3 Perrier cluster-pak") from the store shelf to the check-out counter. Plaintiff alleges that while carrying the cluster-pak, the cardboard carton gave way, allowing one bottle of water to fall to the ground and break. He further alleges that upon impact with the floor, a piece of the glass bottle was propelled into his eye, thereby causing injury.

II. *PROCEDURAL HISTORY*

Plaintiff filed his complaint alleging two counts sounding in implied warranty and negligence. He named as defendants Great Waters of France, Inc., alleged to be the distributor of Perrier Products in Dade County, Florida, and Mead, alleged to be the manufacturer of the cardboard carton holding the six Perrier bottles thereby forming the cluster-pak.

Mead filed its answer and, pursuant to Florida Rule of Civil Procedure 1.140(b), asserted its defense that "the Court lacks personal jurisdiction over it." This motion to dismiss is based solely on this Court's lack of personal jurisdiction over Mead.[1]

---

[1] When a defendant has raised the defense of lack of personal jurisdiction in a responsive pleading pursuant to Florida Rule of Civil Procedure 1.140(b), the issue is properly

(Continued on following page)

In support of this motion, Mead has attached the affidavit of Olindo Iacobelli, Mead's Vice President and General Manager, (Exhibit "A"), and the answers to interrogatories propounded to co-defendant Great Waters of France, Inc. (Exhibit "B"). The affidavit indisputably establishes that Mead is a French corporation with absolutely no presence in Florida. Mead conducts no business in Florida, maintains no offices in Florida, has no employees in Florida, solicits no business in Florida, has no interest in any property in Florida, and is not licensed or authorized to do business in Florida. One hundred percent of the Perrier cluster-pak cartons produced by Mead are manufactured in France. One hundred percent of those cartons are sold and delivered by Mead in France to another French corporation, Perrier. Mead has never contemplated that its sales of cluster-pak cartons to Perrier of France in France would subject it to lawsuits in Florida. During the three years prior to plaintiff's accident, only 7.74% of 2X3 Perrier cluster-paks manufactured by Mead for the United States market were distributed by Great Waters of France, Inc. to Florida. A simple mathematical calculation reveals that a mere .4% of Mead's total income during those three years was derived from the sale to Perrier of the number of 2x3 Perrier cluster-paks ultimately delivered into Florida. (*See* Exhibits A and B).

(Continued from previous page)

raised before the court upon a subsequently filed motion to dismiss. *See* Cumberland Software, Inc. v. Great American Mortgage Corp., 507 So.2d 794 (Fla. 4th DCA 1987); Kimbrough v. Rowe, 479 So.2d 867 (Fla. 5th DCA 1985).

III. *LEGAL ARGUMENT*

As Mead has no presence in Florida, the only possible authority that plaintiff can assert for the proposition that this Court has personal jurisdiction over Mead is Florida Statute § 48.193(1)(f)(2)(1987) which states:

> (1) Any person, whether or not a citizen or resident of this state, personally or through an agent does any of the acts enumerated in this subsection thereby subjects himself and, if he is a natural person, his personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of the following acts:
>
> (f) causing injury to persons or property within the state arising out of an act or omission by the defendant outside this state, if, at or about the time of injury, . . . :
>
> (2) products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade or use.

Plaintiff's allegations that Mead improperly manufactured a product in France which caused an injury in Florida seem to fall within the language of Section 48.193(1)(f)(2). However, the inquiry of whether a Florida court can assert jurisdiction in a case does not stop at the mere determination that the allegations of a complaint meet the literal requirements of the long-arm statute. "Even though a non-resident defendant may appear to fall within the literal meaning of the long-arm statute, in a given situation a plaintiff may not constitutionally apply the statute to obtain jurisdiction in the absence of the requisite minimum contacts by the defendant with the forum state." *Pacific Telephone and Telegraph Co. v. Geist,*

505 So.2d 1388, 1390 (Fla. 5th DCA 1987); *Scordilis v. Drobnicki*, 443 So.2d 411 (Fla. 4th DCA 1984); *Osborn v. University Society, Inc.*, 378 So.2d 873 (Fla. 2d DCA 1979). A state's long-arm statute is void as violative of the due process clause of the Fourteenth Amendment to the United States Constitution if applied to assert jurisdiction over a defendant who lacks sufficient minimum contacts with the forum state.

It is of course beyond question that the Due Process Clause of the United States Constitution "does not contemplate that a state may make binding a judgment *in personam* against a . . . corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S. 310, 319 66 S.Ct. 154, 90 L.Ed. 95 (1945). Whether sufficient contacts exist depends on whether "a corporation purposefully avails itself of the privilege of conducting activities within the forum state." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 290, 62 L.Ed.2d 490, 100 S.Ct. 559 (1980). "[U]nilateral activity of another party *or a third person* is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 80 L.Ed.2d. 404, 412, 104 S.Ct. 1868 (1984) (emphasis added). "Unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed.2d 1283, 1298, 78 S.Ct. 1228 (1958).

In the instant case, it is undisputed that Mead has no contact with Florida. One hundred percent of the clusterpak cartons produced by Mead are sold and delivered in

France to Perrier, also a French corporation. Perrier integrates those cartons into its 2x3 cluster-pak product.[2] Once sold and delivered to Perrier, Mead has no control over where those cartons are directed by Perrier. Although the possibility that cartons may be used in Florida cannot be denied, Mead has no control over where its cartons are used. The unilateral actions of Perrier and Perrier's distributors which direct the cluster-paks to Florida, cannot satisfy the requirement that Mead have sufficient contact with Florida.

The instant case is virtually identical to the most recent pronouncement of the United States Supreme Court on the issue of minimum contacts. In *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County,* ___ U.S. ___, ___ L.Ed.2d ___, 107 S.Ct. 1026 (1987), the plaintiffs alleged that they suffered damages resulting from a motorcycle accident caused by a defective tire. The tire was manufactured by a Japanese company. A valve stem, alleged to be the specific defective component of the tire, was manufactured by a Chinese company which supplied the Japanese company with the valve. The plaintiffs sued the Japanese company who in turn cross-claimed against the Chinese company. The Chinese company raised as a defense that the California court had no *in personam* jurisdiction over it. As in the instant case, the Chinese company had no contact with

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[2] In Florida the cardboard carton of a beverage six-pack (referred to by the courts as a "secondary container"), is a component part of the six-pack for purposes of product liability considerations. Schuessler v. Coca-Cola Bottling Co. of Miami, 279 So.2d 901 (Fla. 4th DCA 1973); Gay v. Kelly, 200 So.2d 568 (Fla. 1st DCA 1967).

the forum state. It simply supplied its product to the Japanese company in Japan. It was the Japanese company who incorporated that product into the tires and delivered the final product to the forum state.

Upon review the United States Supreme Court held that there could be no *in personam* jurisdiction over the foreign component part manufacturer even though it expected its product to be used in the forum state. The plurality opinion authored by Justice O'Connor reaffirmed the well-established concept that "the 'substantial connection' between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum state." *Asahi,* 107 S.Ct. at 1033. As emphasized by the Court:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state.
>
> * * *
>
> [A] defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state.

Asahi, 107 S.Ct. at 1033.

Mead does not deny that when it sells its cartons to Perrier in France that it is possible that some of those cartons will reach Florida. However, as held on numerous occasions by the United States Supreme Court, and as reaffirmed by the plurality in *Asahi,* ' foreseeability alone has never been a sufficient bench mark for personal jurisdiction under the due process clause." *World-Wide,* 62

L.Ed.2d at 500. Foreseeable unilateral activity of a person not party to the lawsuit cannot suffice to confer jurisdiction over a defendant. *See Hanson, supra.* In the instant case, Perrier's actions, whether or not foreseeable, cannot confer jurisdiction over Mead.

Similarly, the fact that Mead may collaterally derive some indirect financial benefit from Perrier's actions also cannot confer jurisdiction over Mead. "[F]inancial benefits accruing to the defendant from a collateral relation to the forum state will not support jurisdiction if it did not stem from a constitutionally cognizable contact with that state." *World-Wide,* 62 L.Ed.2d at 502.[3]

There is but one federal decision construing Florida's long-arm statute after *Asahi.* In *Tomashevsky v. Komari Printing Machinery Co., Ltd.,* 691 F.Supp. 336 (S.D. Fla. 1988), the court agreed with the *Asahi* plurality and held "that merely placing a product into the stream of commerce, without more activity directed toward the forum state cannot subject a defendant to suit in a foreign state." *Id.* at 339.

It would be less than ingenuous to state that the narrow stream of commerce theory relied on by the *Asahi* plurality is settled law. Despite the constitutional pillars supporting the narrow construction, there are those who

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[3] Even if the derivation of a financial benefit were somehow relevant, it would not support a finding of jurisdiction in the instant case. In the three years preceding plaintiff's alleged injury, Mead derived a mere .4% of its entire income from sales of 2x3 cluster paks ultimately sold by Perrier in Florida. (Exhibits A and B).

promote a broad stream of commerce theory. That construction would allow jurisdiction over a foreign defendant whose sole relation to the forum state is that its manufactured product somehow found its way to the forum. In reality such a foreign defendant has no contact with the forum state. The broad theory is one founded upon a legal fiction created as a matter of convenience in order to decrease the burden of litigation on injured *plaintiffs*. *Asahi*, 107 S.Ct. 1035-38 (Brennan dissenting).

Although the burdens placed on a plaintiff seeking restitution from a defendant are a legitimate concern, that concern has only recently been injected into the personal jurisdiction arena. Traditionally, the concept of "minimum concept (sic)" has been applied to protect *defendants*. *International Shoe Co. v. Washington, supra; McGee v. International Life Insurance Co.*, 355 U.S. 220, 2 L.Ed.2d 223, 78 S.Ct. 199 (1957):

> It protects the defendant against the burdens of litigating in a distant or inconvenient forum.

World-Wide, 62 L.Ed.2d at 498. As of late, however, modern commercial realities have prompted an appropriate discussion among commentators and judges alike, regarding providing plaintiffs with easier access to foreign defendants.

Gray v. American Radiator and Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961) is the seminal case giving rise to the broad stream of commerce theory. In *Gray*, the Illinois Supreme Court applied the broad theory to assert jurisdiction over a component-parts manufacturer that sold no components directly in Illinois, but did sell them to a manufacturer who incorporated them into a

final product that was sold in Illinois. That court found it necessary to adopt a broad stream of commerce theory in light of the economic realities of modern commercial transactions:

> [T]oday's facilities for transportation and communication have removed much of the difficulty and inconvenience formerly encountered in defending lawsuits brought in other states. Unless they are applied in recognition of the changes brought about by technological and economic progress, the jurisdictional concepts which may have been reasonable enough in a simpler economy lose the relation to reality, and injustice rather than justice is promoted. Our unchanging principles of justice, whether procedural or substantive in nature, should be scrupulously observed by the courts. But the rules of law which grow and develop within those principles must do so in light of the facts of economic life as it is lived today.

Gray, supra at 766.

There is no question that a state has a substantial interest in providing restitution for its injured residents. To achieve that end in modern society, it may be appropriate to shift the burden of litigation in a foreign forum from the plaintiff to the manufacturing industry. Additionally, it may well be proper for the judiciary to interpret laws in light of modern realities to ensure that injured plaintiffs have adequate access to that restitution. When, however, a court can accomplish a change in the law on other than constitutional grounds, constitutional interpretation should be avoided. *See Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 61 L.Ed.2d 450, 99 S.Ct. 2701 (1979).

Justice Brennan, a prominent promoter of the broad stream of commerce theory, has admitted that in order for the broad theory to withstand constitutional scrutiny, traditional constitutional concepts governing personal jurisdiction need be modified:

> The importance of the general state interest in assuring restitution for its own residents previously found expression in cases that went outside the then-prevailing due process framework to authorize state-court jurisdiction over non-resident motorists who injure others within the state . . . More recently, it has led states to seek and to require jurisdiction over non-resident tortfeasors whose purely out-of-state activities produce domestic consequences. *E.g., Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).

Shaffer v. Heitner, 433 U.S. 186, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977) (Brennan, dissenting).

Acceptance of the broad stream of commerce theory requires a re-interpretation of the Due Process Clause. Therefore the broad theory can only be justified if the same goals achieved by the new interpretation cannot be achieved through other means. *Wolston, supra.* As will be demonstrated, due to recent developments in substantive product liability law, the alterations to conventional constitutional concepts required by the broad theory are not necessary and therefore should be avoided.

As recognized by the Florida Supreme Court, the question of whether a state can assert jurisdiction over a foreign manufacturer is one "not entirely divorced from the substantive question of the manufacturer's liability for the consequences of defects." *Ford Motor Co. v. Atwood Vacuum Machine Co.*, 392 So.2d 1305, 1312 (Fla. 1981). In

recent years, the substance of product liability law has been altered to alleviate the recognized burdens of a plaintiff suing a foreign manufacturer. In all 50 states, Puerto Rico and the District of Columbia, the adoption of the doctrine of strict liability or its equivalent[4] has obviated the need for a plaintiff to sue a foreign manufacturer in order to recover for damages caused by that foreign manufacturer. Based on a cause of action for strict liability, any of the commercial entities along the chain of distribution of a product can be held liable for damages caused by a product or a component of a product.

In today's commercial network, a component part manufactured in France may be sent to an assembler in France who in turn may send the assembled product to a United States distributor who in turn may send the product to a state-wide distributor who in turn may send the product to a local wholesaler who in turn may send the product to a local retailer from whom the consumer purchases the product. At least one, if not most of those "boatsmen" along the stream of commerce have minimum contacts with the forum state. The plaintiff can look to any of those commercial entities for restitution. After the plaintiff has been fully recompensed, it is for the commercial entities to litigate among themselves via indemnity actions to determine which of them were at fault. *See* L. Fumer and M. Freidman, Products Liability,

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[4] Although Delaware, Massachusetts, Michigan, North Carolina and Virginia have yet to adopt strict liability, those states have enacted laws imposing implied warranties which are virtually identical to the strict liability requirements of Restatement (Second) of Torts § 402A.

§ 15.03(1) (1988), *citing, Texaco, Inc. v. McGrew Lumber Co.*, 117 Ill.2d 351, 254 N.E.2d 584 (1969) ("the policy considerations announced . . . in imposing strict liability justify the relief of indemnity against persons in the distributive chain who have placed a product in the stream of commerce with the knowledge of its intended use.") As stated by the commentators to the Restatement (Second) of Torts, and every jurisdiction to adopt strict liability, the very purpose of imposing strict liability is to shift the burdens of compensating for damages caused by a defective product from the innocent users of those products to the commercial entities that have profited from those products:

> The justification for the strict liability has been said to be . . . that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained . . .

Restatement (Second) of Torts § 402A comment C.

The adoption of strict liability has accomplished the precise goal sought by the promoters of the broad stream of commerce theory: increased availability of compensation for plaintiffs injured by foreign defendants. Contrary to the belief of the promoters of the broad stream of commerce that constitutional norms need be altered to achieve that goal, this shift of the burdens of litigation from plaintiffs to the manufacturing industry was accomplished by changes made to substantive products liability law. Because of the adoption of strict liability it is not necessary for a court to stretch the elastic arms of blind justice halfway around the world to grab and haul into

the forum state a foreign defendant who has absolutely no contact with the (sic) that state. It is not necessary for a court to distort the Constitution beyond all recognition to ensure that a plaintiff can seek compensation for damages caused by a defective product. Indeed, foreign manufacturers are as much entitled to substantial fairness and justice as are resident plaintiffs.

It is quite clear that the promoters of the broad stream of commerce theory have not given any consideration to the recent changes to substantive product liability law. They have relied on law which was developed prior to the adoption of strict liability. It is very telling indeed that the seminal case of the broad stream of commerce theory, *Gray v. American Radiator & Standard Sanitary Corp., supra,* an Illinois decision, was decided five years prior to the adoption of strict liability in Illinois. *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965). With the adoption of strict liability into American jurisprudence, plaintiffs injured by foreign manufacturers have been provided with greater access to restitution. Equally important, that legitimate goal has been achieved while simultaneously preserving traditional constitutional norms. As demonstrated, the broad stream of commerce theory is no longer viable or justifiable.

Lest this Court feels that there are any Florida cases which mandate a finding of jurisdiction in this case, Mead would note that there is no longer any Florida case which controls the issue at bar. Although seemingly relevant to the instant case, *Ford Motor Co. v. Atwood Vacuum Machine Co.*, 392 So.2d 1305 (Fla. 1981) is wholly inapplicable for two distinct reasons. First, after the decision of the United States Supreme Court in *Asahi, Atwood* is no

longer viable law. Second, to the extent that *Atwood* may be viable, it is wholly distinguishable from the instant case.

In *Atwood*, an injured consumer sued the assembler of a product in a Florida court, who in turn brought a third party action against the manufacturer of a component part of the assembled product. The injured party and assembler thereafter settled their claim. Thus, the only remaining claim was a third party complaint matching an Illinois component part manufacturer against a Michigan assembler. These are virtually the same circumstances surrounding the *Asahi* case. In *Asahi*, all nine justices were of the opinion that a forum state has no jurisdiction over a non-resident component part manufacturer in an indemnification action filed by a non-resident assembler when the transaction on which the indemnification claim is based took place outside the forum state. In *Atwood*, the component part was manufactured in Illinois and shipped to the assembler in Michigan. As held by the Court in *Asahi*, under those circumstances the forum state has only a "slight interest" and the exercise of personal jurisdiction by the forum state over the component part manufacturer would be unreasonable and unfair.

After *Asahi*, the Court's holding in *Atwood* that Florida could assert jurisdiction can no longer be sustained. Even if it could be argued that *Atwood* was still viable, *Atwood* would not control the instant case because it is wholly distinguishable. In *Atwood*, the parties to the action were both American business enterprises. Upon finding that the forum state had jurisdiction over a corporation from another state, the Court recognized "the shift

in emphasis from the territorial view [of personal jurisdiction] to a view emphasizing reasonableness in the context of relations among interdependent states as members of a federated union . . . " *Atwood, supra* at 1310. The Court cited extensively from Hazard, *A General Theory of State-Court Jurisdiction*, 1965 Sup.Ct.Rev. 241, 246:

> The peculiar features of the jurisdictional problem in the United States, then, is that our national economic and social unity is conducive to the full panoply of substantive transactions found internally in a unitary state . . . [T]he Full Faith and Credit Clause and the Due Process Clause embody judicially enforceable limitations on state-court authority. However interpreted from time to time, they make state-court jurisdiction a matter of American municipal law and not a species of demi-international law.

Atwood, supra, at 1309.

In *Asahi*, the Court recognized that the interests of the "several states," are not in question when the foreign defendant is not a resident of the United States. Rather, consideration must be given to the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by the forum state. Based on the interests of the foreign nations involved, and the federal interest regarding foreign relations policies, the Supreme Court in *Asahi* was unwilling to find that the forum state had personal jurisdiction over a foreign component part manufacturer who had no contact with that state. As the Court admonished:

> Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.

Asahi, supra at 1035, *citing, United States v. First National City Bank*, 379 U.S. 378, 404, 85 S.Ct. 528, 542, 13 L.Ed. 2d, 365 (1965) (Harlan, J. dissenting). In the instant case, as Mead is a corporation organized under the laws of a foreign nation, *Atwood* has no application.

IV. *CONCLUSION*

There is no Florida decision controlling the instant case. The recent pronouncements of the United States Supreme Court, however, dictate that Florida cannot exercise personal jurisdiction over Mead, a foreign component part manufacturer who has no contact with Florida other than that its product reaches Florida through the stream of commerce. Florida Statute Section 48.193(1)(f)(2)(1987) is invalid as applied to the facts of this case as the statute is repugnant to the Fourteenth Amendment of the United States Constitution. Accordingly, as there is no basis for personal jurisdiction over Mead, plaintiff's complaint must be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 10th day of March, 1989 to: ARNOLD D. HESSEN, ESQ., Coral Plaza, Suite 400, 2100 Coral Way, Miami, Florida 33145; and DAVID R. HOWLAND, ESQ., Howland & Krieger, 145 Almeria, Coral Gables, Florida 33145.

BLACKWELL, WALKER, FASCELL
& HOEHL
Attorneys for Defendant MEAD

By: /s/ Douglas H. Stein
DOUGLAS H. STEIN
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
Telephone: (305) 358-8880

89DHS0043

EXHIBIT "A"

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 88-25911 CA 16

SEAN BERNSTEIN,

Plaintiff,

vs.

GREAT WATERS OF FRANCE, INC., a foreign corporation, and MEAD EMBALLAGE, S.A., a foreign corporation,

Defendants.

AFFIDAVIT OF OLINDO IACOBELLI

BEFORE ME, the undersigned authority personally appeared OLINDO IACOBELLI, who, after being first duly sworn, deposes and says:

1. I am presently employed in the position of Vice-President and General Manager by Mead Emballage, S.A., a corporation organized under the laws of France, with its principal place of business in Chateauroux, France. I have personal knowledge of the matters set forth in this affidavit.

2. At all times relevant to this lawsuit, Mead Emballage, S.A. did not:

(a) operate, conduct, engage in, or carry on in a business or business venture in the state of Florida;

(b) maintain an office or agency in the state of Florida;

(c) have any employees or agents within the state of Florida;

(d) advertise or solicit business in any manner within the state of Florida;

(e) have ownership interest in any property, real, personal, or otherwise, in the state of Florida;

(f) enter into or perform any contracts in the state of Florida

3. Mead Emballage, S.A. has never been and presently is not licensed or authorized to do business in the state of Florida.

4. In 1984, Mead Emballage, S.A. manufactured and sold 11,176,400 2x3 6.5 oz. Perrier Cluster-Pak cartons. In 1985, Mead Emballage, S.A. manufactured and sold 17,222,800 2x3 6.5 oz. Perrier Cluster-Pak cartons. In 1986, Mead Emballage, S.A. manufactured and sold 12,718,000 2x3 oz. Perrier Cluster-Pak cartons.

5. In 1984, Mead Emballage, S.A. received $155,184 for the sale of 848,976 2x3 6.5 oz. Perrier Cluster-Pak cartons to Perrier of France. In 1985, Mead Emballage, S.A. received $191,866 for the sale of 989,428 2x3 6.5 oz. Perrier Cluster-Pak cartons to Perrier of France. In 1986, Mead Emballage, S.A. received $254,176 for the sale of 1,352,368 2x3 6.5 oz. Perrier Cluster-Pak cartons to Perrier of France.

6. In 1984, the total sales of all products of Mead Emballage, S.A. was $46,000,000. In 1985, the total sales of all products of Mead Emballage, S.A. was

$47,000,000. In 1986, the total sales of all products of Mead Emballage, S.A. was $55,000,000.

7. One hundred percent of the 2x3 6.5 oz. Perrier Cluster-Pak cartons are manufactured within the borders of France.

8. One hundred percent of the 2x3 6.5 oz. Perrier Cluster-Pak cartons manufactured by Mead Emballage, S.A. are sold and delivered within the borders of France to Perrier of France.

9. After the sale and delivery of any carton to Perrier in France, Mead Emballage, S.A. has no control or authority to direct the ultimate destination of the carton. Mead Emballage, S.A. did not create, control or employ the distribution system utilized by Perrier of France that brings Cluster-Pak cartons to the state of Florida.

10. No carton manufactured by Mead Emballage, S.A. is specifically manufactured for distribution in the state of Florida.

11. Mead Emballage, S.A. has never expected that its sales of 2x3 6.5 oz. Perrier Cluster-Pak cartons to Perrier of France in France would subject it to lawsuit in the state of Florida.

FURTHER AFFIANT SAITH NOT.

/s/ Olindo Iacobelli
OLINDO IACOBELLI,
Vice President and General Manager
Mead Emballage, S.A.
Chateauroux, France

REPUBLIC OF FRANCE,)
CITY OF PARIS SS

EMBASSY OF THE UNITED)
STATES OF AMERICA)

SWORN TO AND SUBSCRIBED
BEFORE ME this 10th day of March, 1989.

/s/ Jonathan McHale
NOTARY PUBLIC

Jonathan McHale
Vice-Consul
United States of America

EXHIBIT "B"

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 88-25911 CA 16
Florida Bar No: 127763

SEAN BERNSTEIN,

Plaintiff,

vs.

GREAT WATERS OF FRANCE, INC., et al.,

Defendants.

ANSWERS TO INTERROGATORIES

The following are the Answers of defendant to the Interrogatories served upon GREAT WATERS OF FRANCE, INC. by the defendant, MEAD EMBALLAGE, S.A., pursuant to Rule 1.340 of the Florida Rules of Civil Procedure.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 15th day of February, 1989 to: CHARLES P. FLICK, ESQUIRE, Attorneys for Mead Emballage, S.A., 2400 Amerifirst Building, One Southeast Third Avenue, Miami, FL 33131; and ARNOLD D. HESSEN, ESQUIRE, Coral Plaza, Suite 400, 2100 Coral Way, Miami, FL 33145.

LAW OFFICES OF HOWLAND &
KRIEGER Attorneys for Deft.,
GREAT WATERS
145 Almeria
Coral Gables FL
33145
893-5506 (Dade) 446-1200
524-5202 (Broward)

By: David R. Howland
David R. Howland

DRH:jm

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 88-25911 CA 16

SEAN BERNSTEIN,

Plaintiff,

vs.

GREAT WATERS OF FRANCE, INC., et al.,

Defendants.

DEFENDANT MEAD EMBALLAGE, S.A.'S NOTICE OF FILING INTERROGATORIES

FL. BAR # 253324

NOTICE IS HEREBY GIVEN pursuant to Florida Rule of Civil Procedure 1.340 that Defendant, MEAD EMBALLAGE, S.A. has on this date propounded Interrogatories to Defendant GREAT WATERS OF FRANCE, INC.

DATED: January 17, 1989.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was this 17th day of January, 1989, mailed to: Arnold D. Hessen, Esq., Hessen, Schimmel & De Castro, Coral Plaza, Suite 400, 2100 Coral Way, Miami, Florida 33145; and David R. Howland, Esq., Ress, Gomez, Rosenberg, Howland & Mintz, P.A., 1700 Sans Souci Blvd., North Miami, Florida 33181.

BLACKWELL, WALKER, FASCELL & HOEHL Attorneys for Defendant Mead Emballage, S.A.

By: Charles P. Flick
Charles P. Flick
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 88-25911 CA 06

SEAN BERNSTEIN,

Plaintiff,

vs.

GREAT WATERS OF FRANCE, INC., et al.,

Defendants.

INTERROGATORIES TO DEFENDANT GREAT WATERS OF FRANCE, INC.

FL. BAR #253324

The Defendant, MEAD EMBALLAGE, S.A., herein propounds the following 4 Interrogatories to the Defendant GREAT WATERS OF FRANCE, INC., to be answered within the time provided by the applicable Florida Rules of Civil Procedure.

WE HEREBY CERTIFY that the original of the following Interrogatories were mailed to: David R. Howland, Esq., Ress, Gomez, Rosenberg, Howland & Mintz, P.A., 1700 Sans Souci Blvd., North Miami, Florida 33181 this 17th day of January, 1989.

BLACKWELL, WALKER, FASCELL & HOEHL Attorneys for Defendant Mead

By: Charles P. Flick
Charles P. Flick
2400 AmeriFirst Building
One Southeast Third Avenue
Miami, Florida 33131
(305) 358-8880

INTERROGATORIES TO GREAT WATERS OF FRANCE, INC.

1. From 1984 through 1986 was GREAT WATERS OF FRANCE, INC. the exclusive distributor of 2X3 6½ ounce Perrier Cluster-Pak packages within the state of Florida? If not, please state the full name and address of any other distributor of this product within the state of Florida during the stated time period.

YES

2. Please state the total number of 2X3 6½ ounce Perrier Cluster-Pak packages sold by GREAT WATERS OF FRANCE, INC. within the state of Florida in 1984.

212,244 Cases of Perrier containing Cluster-Pak packages.

Total: 848,976 six-packs.

3. Please state the total number of 2X3 6½ ounce Perrier Cluster-Pak packages sold by GREAT WATERS OF FRANCE, INC. within the state of Florida in 1985.

247,357 Cases of Perrier containing Cluster-Pak packages.

Total: 989,428 six-packs.

4. Please state the total number of 2X3 6½ ounce Perrier Cluster-Pak packages sold by GREAT WATERS OF FRANCE, INC. within the state of Florida in 1986.

338,092 Cases of Perrier containing Cluster-Pak packages.

Total: 1,352,368 six-packs.

GREAT WATERS OF FRANCE, INC.

By: Douglas E. Rousseau

STATE OF)
) SS:
COUNTY OF)

BEFORE ME, the undersigned authority, this day, personally appeared Douglas E. Rousseau, who being by me first duly sworn, deposes and says that ___he has executed the foregoing Interrogatories and they are true and correct to the best of h___ knowledge and belief.

SWORN TO AND SUBSCRIBED before me this 8th day of Feb., 1989.

/s/ Meribeth Wyman
Notary Public, State of Conn.
at Large

My Commission Expires:
MERIBETH WYMAN
NOTARY PUBLIC
My Commission Expires March 31, 1990

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the original Answers to Interrogatories was mailed this ___ day of ___, 198___ to:

_____